

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA
3

4 United States of America,
5 Plaintiff
6 v.
7 Ian Alexander Pincombe,
8 Defendant
9

2:14-cr-00178-JAD-GWF

**Order Overruling Objections and
Affirming Order**

[ECF No. 152]

10 Ian Pincombe stands charged with coercion and enticement in violation of 18 U.S.C. §
11 2422(b); possession of child pornography in violation of 18 U.S.C. § 2252A(a)(5)B); and receipt or
12 distribution of child pornography in violation of 18 U.S.C. §§ 2252(a)(2) and 2252(b)(1).¹ Pincombe
13 moved for an expert witness under FRE 704, arguing that the witness will testify regarding the
14 likelihood of him engaging in sexual activity with a minor.² Pincombe previously moved for an
15 “internet sex chat linguistics” expert³ and Magistrate Judge Foley denied that motion.⁴ Judge Foley
16 similarly denied Pincombe’s instant motion because it “appears to be restating arguments that were
17 already presented in [his earlier] motion that the court has already denied” and because the
18 “proffered testimony is irrelevant” and is excludable under FRE 704(b) because it is offered to show
19 that Pincombe lacked the intent to persuade, induce, or entice a minor into sexual activity.⁵
20 Pincombe objects to Judge Foley’s order.⁶

21 Having reviewed Judge Foley’s order, I overrule Pincombe’s objections, and affirm Judge
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23 ¹ ECF No. 94.

24 ² ECF No. 133.

25 ³ ECF No. 114.

26 ⁴ ECF No. 124.

27 ⁵ ECF No. 149 at 1–2 (citing *United States v. Hofus*, 598 F.3d 1171 (9th Cir. 2010)).

28 ⁶ ECF No. 152.

1 Foley's order.

2 **Discussion**

3 **A. Standards of review**

4 Non-dispositive pretrial matters may be decided by a magistrate judge, subject to
5 reconsideration by a district judge.⁷ "The district judge in the case must consider timely objections
6 and modify or set aside any part of the order that is clearly erroneous or is contrary to law."⁸ I may
7 affirm, reverse, or modify, in whole or in part, the ruling made by the magistrate judge; I also may
8 remand the matter to the magistrate judge with instructions.⁹ Motions for expert witnesses are non-
9 dispositive pretrial motions within the scope of FRCP 72(2) and 28 U.S.C. § 636(b)(1)(A), and, thus,
10 are subject to the clearly erroneous or contrary to law standard of review.

11 **B. Judge Foley's order is supported by the law.**

12 Irrelevant evidence is not admissible.¹⁰ Relevant evidence is "evidence having any tendency
13 to make the existence of any fact that is of consequence to the determination of the action more
14 probable or less probable than it would be without the evidence."¹¹ Relevant evidence may be
15 excluded if its probative value is substantially outweighed by a danger of unfair prejudice, confusing
16 the issues, or misleading the jury.¹² An expert witness in a criminal case may not offer an opinion
17 about whether the defendant did or did not have a mental state that constitutes an element of a crime
18 charged.¹³ If expert testimony is "offered to show [a defendant's] propensity to commit the
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20 ⁷ Fed. R. Civ. P. 72(a).

21 ⁸ *Id.*; *see also* 28 U.S.C. § 636(b)(1)(A) (for non-dispositive matters, a district judge may reconsider
22 the magistrate judge's determination "where it has been shown that the magistrate judge's order is
23 clearly erroneous or contrary to law").

24 ⁹ L.R. IB 3-1.

25 ¹⁰ Fed. R. Evid. 402.

26 ¹¹ Fed. R. Evid. 401.

27 ¹² Fed. R. Evid. 403.

28 ¹³ Fed. R. Evid. 704(b).

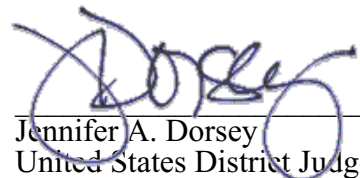
1 underlying sexual act, it is irrelevant . . . [and] if offered on the ultimate issue of intent to persuade or
2 entice under § 2422, it is prohibited by Rule 704.”¹⁴

3 Pincombe’s proposed expert testimony—that Pincombe lacked the intent to persuade, induce,
4 or entice a minor into sexual activity—is excludable under FRE 704(b). To the extent that the
5 testimony of the expert witness would be offered to show a lack of propensity to commit the
6 underlying sexual act, it is irrelevant and is not admissible under Rule 402. Accordingly, Judge
7 Foley’s order denying Pincombe’s motion for an expert witness is supported by the law and is,
8 therefore, affirmed.

9 Conclusion

10 Accordingly, IT IS HEREBY ORDERED that Pincombe’s objections to Magistrate Judge
11 Foley’s order [ECF No. 152] are **OVERRULED**; Judge Foley’s order [ECF No. 149] is
12 **AFFIRMED**.

13 Dated May 18, 2017

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16 Jennifer A. Dorsey
United States District Judge

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¹⁴ *Hofus*, 598 F.3d at 1181 n. 5.